The Risk Concept in the New Merger Guidelines: Treating a Proposed Merger Like Schrödinger's Cat

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ON DECEMBER 18, 2023, THE U.S. DEPARTment of Justice and the Federal Trade Commission (the Agencies) issued the new Merger Guidelines (MGs) setting out their policies for enforcing Section 7 of the Clayton Act. The policies articulated by new MGs differ in both obvious and subtle ways from those of the 2010 Horizontal Merger Guidelines (HMGs).[1] This article explores a single difference that is both obvious and subtle—the MGs' "risk" concept.

The MGs use the word "risk" more than 40 times in phrases such as "risk to competition." Most notably, the Overview states:

> Section 7 was designed to arrest anticompetitive tendencies in their incipiency. The Clayton Act therefore requires the Agencies to assess whether mergers present risk to competition. The Supreme Court has explained that "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition'" or to tend to create a monopoly. Accordingly, the Agencies do not attempt to predict the future or calculate precise effects of a merger with certainty. Rather, the Agencies examine the totality of the evidence available to assess the risk the merger presents.[2]

The Overview goes on to explain that the MGs "set forth analytical frameworks (referred to herein as 'Guidelines') to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action."[3]

The MGs' 40-some references to risk suggest that the concept encompasses, in some fashion, all that is contained in Section 7's operative phrase—"may be substantially to lessen competition." But the exposition of the risk concept presents two puzzles: How does "risk" compare to "reasonable probability"—the standard long applied by the courts in Section 7 cases? And if the Agencies "do not attempt to predict the future," how do they "assess the risk the merger presents"?

The first clue in solving these puzzles is linguistic: The word "risk" does not itself imply significance, so the absence of an intensifying adjective signals that the Agencies have lowered the threshold for prima facie illegality. They evidently intend to challenge a merger posing a "risk to competition" that cannot be characterized as "appreciable," "dangerous," "substantial," or "undue."

Two further clues are found by comparing the quoted paragraph from the MGs' Overview to the corresponding paragraph in the HMGs:

> The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.[4]

First, the MGs contain nothing like the first sentence of the paragraph from the HMGs. All merger guidelines issued from 1982 to 2010 stated an intention to avoid interference with mergers that do not substantially lessen competition, but the new MGs do not. One reasonably can infer that the Agencies no longer strive to avoid unnecessary interference with mergers that are either competitively beneficial or neutral.

Second, the MGs contradict the HMGs on whether Section 7 enforcement is a predictive exercise comparing two alternative futures—the most likely future with the proposed merger and the most likely future without it. Instead, the Agencies describe what might be termed "quantum antitrust" due to its resemblance to quantum mechanics. In quantum antitrust, all plausible futures with a proposed merger exist in superposition; at the same time, a merger can both substantially lessen competition and not substantially lessen competition.

Erwin Schrödinger's 1935 thought experiment illustrated superposition in a manner that entered into popular culture and has been alluded to by courts:

> A cat is penned up in a steel chamber, along with the following diabolical device (which must be secured against direct interference by the cat): in a Geiger counter there is a tiny bit of radioactive substance, so small, that perhaps in the course of one hour one of the atoms decays, but also, with equal probability, perhaps none; if it happens, the counter tube discharges and through a relay releases a hammer which shatters a small flask of hydrocyanic acid. If one has left this entire system to itself for an hour, one would say that the cat still lives if meanwhile no atom has decayed.

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> The first atomic decay would have poisoned it. The [quantum mechanics wave function] would express this by having in it the living and the dead cat (pardon the expression) mixed or smeared out in equal parts.[5]

With his thought experiment, Schrödinger sought to transform the "indeterminacy originally restricted to the atomic domain . . . into macroscopic indeterminacy, which [could] then be resolved by direct observation."[6] Section 7 enforcement, however, affords no means for resolving most of the indeterminacy. It is never possible to observe *both* the post-merger world and the but-for world. Typically, neither can be observed.

Observationally, a proposed merger is like Schrödinger's cat penned up in a steel chamber, and the MGs suggest a quantum antitrust approach by virtue of the fact that they devote thousands of words to the facts and circumstances indicating that a proposed merger plausibly harms competition, but very few words to the facts and circumstances indicating that such harm is likely. Rather than trying to identify the most likely futures with and without a merger, the Agencies determine only whether a merger substantially lessens competition in *any* plausible future.

Prediction under Section 7 of the Clayton Act

Section 7 became a broad prohibition of anticompetitive mergers through a 1950 amendment to the Clayton Act.[7] The Senate Judiciary Committee's report on the amendment explained that:

> The words "may be" appear in the bill in defining the effect on competition of the forbidden acquisitions. Acquisitions are forbidden only where in any line of commerce in any section of the country the effect "may be" substantially to lessen competition or to tend to create a monopoly. The use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the *reasonable probability* of the prescribed effect . . . .[8]

The Supreme Court first interpreted the amended Section 7 in *Brown Shoe*, which cited this and other legislative history in asserting: "Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities."[9]

In *Brown Shoe*, the Court also observed that "the very wording of § 7 requires a prognosis of the probable *future* effect of the merger," and the Court described its task in that case as to "predict the probable future consequences of this merger."[10] The Court asserted that "if there is a reasonable probability that [a] merger will substantially lessen competition . . . , the merger is proscribed."[11]

In *Philadelphia National Bank*, the Court declared that Section 7 "requires . . . a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[12]

And in *Procter & Gamble*, the Court cited *Brown Shoe* and *Philadelphia National Bank* for the proposition that: "The core question [under Section 7] is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. This section can deal only with probabilities, not with certainties."[13]

The Supreme Court explained the application of the reasonable probability standard in cases applying *Brady v. Maryland*, which requires that prosecutors provide favorable evidence to defendants.[14] A failure to do so entitles a defendant to redress if there "is a 'reasonable probability' of a different result" had the evidence been provided,[15] which, the Court stressed, is a materially lower threshold than more likely than not.[16]

As the Ninth Circuit recently observed, prediction "is precisely what" Section 7 requires,[17] and the plaintiff bears the burden of persuasion. The plaintiff's burden is to show, by a preponderance of evidence, that substantial harm to competition is more than merely plausible. Quantitatively, the lower bound for a "reasonable probability" is less than 50%, but how much less is unclear because the law neither quantifies uncertainty nor makes fine distinctions.

Non-Prediction under the MGs

Sections 2.1–2.6 of the MGs elaborate Guidelines 1–6, which describe scenarios in which the Agencies maintain that mergers violate Section 7. Guideline 1, as elaborated by section 2.1, is based on assertion that, "in highly concentrated markets, a merger that eliminates a significant competitor creates a significant risk that the merger may substantially lessen competition."[18] Section 2.1 states that a merger increasing the HHI by more than 100 points to a post-merger HHI exceeding 1,800 "is presumed to substantially lessen competition or tend to create a monopoly."[19]

Under exceptional circumstances, a merger barely qualifying for this presumption could substantially lessen competition, but section 2.1 does not resolve any of the indeterminacy by making further enquiry. For example, the presumption attaches even if the merging firms are the two smallest in the relevant market. Posit a seven-firm market with shares of 25, 20, 16, 14, 10, 8, and 7. Merging the two smallest firms increases the HHI by 112 points to 1,802. Without knowing more, the merger is most likely to turn two ineffective competitors into one effective competitor.

Alternatively, posit a market consisting of three leaders, each with a share of 25%, plus a fringe, yielding a pre-merger HHI of about 1,900. The merger of a market leader and a 2% fringe firm would increase the HHI 100 points but most likely would have no material impact on competition. Without knowing more, it is possible, but highly unlikely, that the merger would significantly facilitate coordination. It is overwhelmingly likely that the merger would have no material impact on competition.

Guidelines 2 through 6 relate to particular mechanisms through which mergers can substantially lessen competition,

and sections 2.2–2.6 set out conditions under which each mechanism is plausible. But the MGs do not set out conditions that make a substantial lessening of competition likely, as opposed to merely plausible. The Agencies evidently take the position that a risk of harm to competition renders a merger unlawful under Section 7 unless the merging parties demonstrate that it would not substantially lessen competition.

Section 2.2 states that the Agencies presume that a merger substantially lessens competition under a unilateral effects theory when "evidence demonstrates substantial competition between the merging parties prior to the merger."[20] The traditional method of demonstrating "substantial competition" was to show that the merging parties controlled a substantial portion of the relevant market. But section 2.2 asserts that an "analysis of the existing competition between the merging firms can demonstrate that a merger threatens competitive harm independent from an analysis of market shares."[21]

Quantitative tools developed over recent decades sometimes provide a convincing demonstration of substantial unilateral effects from a proposed merger, and section 2.2 cross-references section 4.2, which discusses such tools, including merger simulation. Although merger simulation predicts the competitive effects resulting from mergers, the Agencies "do not attempt to predict the future," so they must use it just to gauge the significance of pre-merger competition. And section 2.2 suggests that the Agencies are apt to rely on more impressionistic evidence.

Although section 2.2 does not mention the risk concept, it is palpable nonetheless because of the absence of any discussion about distinguishing between a substantial and an insubstantial lessening of competition. The elimination of competition between merging parties is a certainty, and their pre-merger competition can be observed, but indeterminacy exists as to whether the lessening of competition is substantial.

Section 2.3 states that the Agencies presume that a "merger materially increases the risk of coordination"[22] if: the relevant market is highly concentrated; significant incumbents "have previously engaged in express or tacit coordination" or even "failed attempts"; *or* the merger eliminates a maverick.[23] The MGs' risk concept is perfectly suited to coordinated effects, which are quintessentially indeterminant.

Supreme Court merger decisions of the 1960s relied on the then-prevailing view of economists that concentration almost invariably resulted in coordination, and that greater concentration resulted in tighter coordination. But that view lost credibility when its empirical and theoretical foundations were eroded. Today, there is no consensus among economists on the incidence or degree of coordination at various levels of concentration. Nor are there generally accepted economic tools for evaluating the likely coordinated effects from mergers.

The Agencies attempt to shift the burden to the parties by contending that 1960s thinking is again relevant:

> In the Agencies' experience, structural conditions that prevent coordination are exceedingly rare in the modern economy. For example, coordination is more difficult when firms are unable to observe rivals' competitive offerings, but technological change has made this situation less common than in the past and reduced many traditional barriers or obstacles to observing the behavior of rivals in a market.[24]

But technological change has done nothing to prevent secret discounting in individually negotiated transactions. That remains the bane of coordination.

Section 2.4 concerns the elimination of a potential entrant and initially discusses the theory of actual potential competition—the idea that entry by one of the merging firms would have increased competition but for the merger.[25] The treatment of actual potential entry might best illustrate the MGs' risk concept.

Section 2.4.A mentions none of the reasons why a potential entrant would conclude that entry is a bad bet, for example, that incumbents have massive advantages or that the market is in decline. Nor does section 2.4.A mention the important possibility that the merger has no material competitive impact because the merging potential entrant is just one of many similarly situated potential entrants. The Agencies make no attempt to resolve indeterminacy in the merger's competitive effect.

In purporting to apply the reasonable probability standard to entry but-for a proposed merger, the MGs turn that standard on its head. Section 2.4.A asserts that: "Subjective evidence that the company considered organic entry as an alternative to merging generally suggests that, absent the merger, entry would be reasonably probable."[26] The Agencies maintain that de novo entry is "reasonably probable" even when a careful evaluation of likely costs and benefits concluded that de novo entry would be unprofitable and thus would not be undertaken.

And even if entry were reasonably probable in the but-for world, it would not follow that the merger has a reasonable probability of substantially lessening competition. Suppose the probability of entry but for the merger is 50%, making it reasonably probable. If the entry has a 60% chance of success, and if the merger has an 80% probability of harming competition with successful entry, the probability of harm to competition from the merger is just 24% (50% × 60% × 80%), which is less than a reasonable probability.

The Agencies also make no attempt to resolve indeterminacy in applying the theory of perceived potential competition. This theory is that a merger eliminates competitive impact that a merging potential entrant already had on the market. Section 2.4.B refers to the "likely influence" of the firm on competition,[27] a phrase employed by the Supreme Court in *Falstaff*.[28] But *Marine Bancorp.* subsequently stated the issue as whether "the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market."[29]

Although the Supreme Court demanded proof of tempering "in fact," section 2.4.B asserts: "Direct evidence that the firm's presence or behavior has affected or is affecting current market participants' strategic decisions is not necessary but can establish a showing of likely influence." And

section 2.4.B ascribes no significance to evidence that the firm's presence has had no effect on market participants. The MGs treat as irrelevant the potential to open the chamber and discover that the cat is alive and well.

Section 2.5 uses the word "risk" seven times in discussing theories of harm to competition involving the combination of firms providing complementary goods or services. Concentrating on a traditional foreclosure theory, section 2.5 discusses the incentive and ability to withhold supply, but the Agencies categorize the unprofitability of a withholding strategy as "rebuttal evidence" as to which the burden rests with the parties.[30] Again, the MGs indicate that the Agencies go only so far as to identify a risk to competition, even when the indeterminacy can be greatly reduced or even eliminated.

When a withholding strategy would not be pursued, section 2.5 asserts that a merger of complementors, nevertheless, can substantially lessen competition, either by disincentivizing rivals facing the possibility of withholding,[31] or by providing the merged firm with competitively sensitive information on downstream rivals that it does supply.[32] These speculative theories of harm to competition allow the Agencies to contend that nearly all significant mergers of complementors pose a sufficient risk to competition.

Section 2.6 concerns mergers that "entrench or extend an already dominant position,"[33] as indicated by "direct evidence or market shares showing durable market power."[34] The most obvious example of such a merger is the acquisition of a direct competitor by a firm commanding a majority of the relevant market, but section 2.6 focuses on other possibilities and cites vertical and conglomerate merger cases.

The MGs assert that the Supreme Court's *Ford-Autolite* decision[35] condemned an "acquisition by dominant firm to obtain a foothold in another market when coupled with incentive to create and maintain barriers to entry into that market."[36] But Ford could not have been dominant in the automobile market, since it was much smaller than General Motors. Nor was there any possibility of Ford dominating the spark plug market. It merely sought to be the supplier of spark plugs for Ford-made cars, just as Chrysler and General Motors supplied the spark plugs for the cars they made.

Section 2.6 sketches scenarios of entrenching or extending an already dominant position, but it does not discuss how the Agencies determine whether any such scenario is more than merely plausible in a particular case. Many of the scenarios involve exclusionary practices adopted after consummation of the proposed merger, but section 2.6 does not examine the incentive to adopt such practices or their legality under antitrust law. Section 2.6 merely identifies risks.

Opportunities to resolve indeterminacy are relegated to section 3. The opening paragraph observes that: "The Supreme Court has determined that analysis should consider 'other pertinent factors' that may 'mandate[] a conclusion that no substantial lessening of competition [is] threatened by the acquisition.'"[37] The myriad issues bearing on the likely competitive effects of a merger are "other pertinent factors," but section 3 discusses only traditional "defenses"—failure, entry, and efficiencies.

The internal quotation is from *General Dynamics*,[38] and this is the only citation to that case in the MGs, although the MGs cite 1960s Supreme Court merger decisions two dozen times. *General Dynamics* ended the era in which Justice Potter Stewart said of the Court's decisions: "The sole consistency that I can find is that in litigation under § 7, the Government always wins."[39] In *General Dynamics*, the Supreme Court held that the government's market shares were faulty and did not make out prima facie case.[40]

Section 3 is titled "rebuttal evidence showing that no substantial lessening of competition is threatened by the merger," and it places the burden of resolving indeterminacy squarely on the merging parties. The MGs do not adequately reflect the fact that the Agencies have the "ultimate burden of persuasion," and to rebut a prima facie case, merging parties need only "cast doubt on the accuracy of the Government's evidence as predictive of future anti-competitive effects."[41]

Insight from Recent Litigation

The JetBlue-Spirit case was tried shortly before the release of the new MGs but presumably illustrates how the Agencies will litigate cases under them. Plaintiffs' proposed conclusions of law appropriately began with an argument on the Section 7 standard, and the most notable contention was that "[c]ourts have interpreted 'reasonable probability' to be synonymous with a 'threat' or 'danger' to competition."[42] Plaintiffs (the U.S. Department of Justice and several state attorneys general) quoted four decisions (two Supreme Court, two appellate court) using one of those words.

Neither of the quoted Supreme Court decisions addressed the Section 7 standard, much less lent support to the plaintiffs' contention. In the quoted passage, *Pabst* held that "Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country."[43] This holding concerned the meaning of "in any section of the country" rather than "may be substantially to lessen competition."

In the quoted passage, *du Pont–General Motors* held that "the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce."[44] This holding clarified that whether a merger "may substantially to lessen competition" is a question answered at the time of suit even if that is well after the consummation of the merger.

The quoted appellate decisions are relevant but of little help to the plaintiffs. Judge Posner stated that "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable,

is called for."[45] Judge Posner's intensifier—"appreciable"—elevates danger to reasonable probability,[46] but the Agencies omitted any such intensifier.

The last quoted decision used the word "threaten" several times in asserting a merger involving the leading firm in a concentrated market violated Section 7 even though the market share of the other merging firm was just one percent.[47] The court condemned the merger on the basis of indications that it could turn "a concentrated market manifesting limited signs of price competition into a rigid, lifeless market tending toward even greater concentration and economic enervation."[48] The court implied that substantial harm to competition was reasonably probable.

In condemning the JetBlue-Spirit merger, the district court stressed that the application of Section 7 is a predictive exercise.[49] And the court's recitation of the applicable standard stressed probability rather than plausibility: "A merger is unlawful under Section 7 if it is reasonably probable that it will result in a substantial lessening of competition in any line of commerce or in any section of the country. Thus, if anticompetitive effects of a merger are probable in any significant market, the merger violates Section 7."[50]

Conclusion

In his *Falstaff* concurrence, Justice Marshall commented that: "Congress did not intend to prohibit all expansion and growth through acquisition and merger. The predictive judgment often required under § 7 involves a decision based upon a careful scrutiny and a reasonable assessment of the future consequences of a merger without unjustifiable, speculative interference with traditional market freedoms."[51]

The 2010 HMGs described an approach to merger assessment deeply rooted in law and experience. The Agencies compared the most likely futures, with and without a proposed merger, to determine whether the merger was likely to substantially lessen competition. Prediction presents difficulties, but the difficult task is made easier by the words "may be" in Section 7. The burden on the Agencies in challenging a merger is to prove that a substantial lessening of competition is reasonable probable.

The new MGs reimagine Section 7 with a risk concept allowing the Agencies to make out a prima facie case merely by showing that a proposed merger poses some danger to competition. The Agencies assert the necessity of establishing only that anticompetitive effects exist in some plausible future. They treat a proposed merger like Schrödinger's cat—at the same time both substantially lessening competition and not substantially lessening competition. ■

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (Aug. 19, 2010) (hereinafter HMGs), https://www.justice.gov/media/810916/dl?inline.

[2] U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines (hereinafter MGs) § 1, ¶ 3 (footnote omitted), quoting Cal. v. Am. Stores Co., 495 U.S. 271, 284 (1990) (quoting Clayton Act § 7, 38 Stat. 731, 15 U.S.C. § 18, and citing Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962)).

[3] MGs, *supra* note 2, § 1, ¶ 5.

[4] HMGs, *supra* note 1, § 1, ¶ 2.

[5] John D. Trimmer, *The Present Situation in Quantum Mechanics: A Translation of Schrödinger's "Cat Paradox" Paper*, 124 PROC. AM. PHIL. SOC'Y 323, 328 (1980).

[6] *Id.*

[7] Ch. 1184, 64 Stat. 1125 (1950), codified at 15 U.S.C. § 18.

[8] S. Rep. No. 81-1775, at 6 (1950) (emphasis added).

[9] Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (footnote omitted).

[10] *Id.* at 332–33.

[11] *Id.* at 325. While much in 1960s Supreme Court merger decisions is out of step with modern antitrust law, the Court's basic understanding of Section 7 remains sound.

[12] United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963).

[13] FTC v. Procter & Gamble Co., 386 U.S. 321, 568 (1967) (citations omitted).

[14] 373 U.S. 83, 87 (1963).

[15] Cone v. Bell, 556 U.S. 449, 469–70 (2009); Kyles v. Whitley, 514 U.S. 419, 433–34 (1995).

[16] *See* Smith v. Cain, 565 U.S. 73, 75–76 (2012); United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004); Strickler v. Greene, 527 U.S. 263, 300 (1999) (Souter, J., concurring in relevant part).

[17] St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 783 (9th Cir. 2015).

[18] MGs, *supra* note 2, § 2.1, ¶ 1.

[19] *Id.* § 2.1, ¶ 4.

[20] *Id.* § 2.2, ¶ 1.

[21] *Id*.

[22] The HMGs used the word "risk" in discussing coordinated effects. HMGs, *supra* note 1, § 1, ¶ 6; § 7.1, ¶ 1.

[23] MGs, *supra* note 2, § 2.3.A.

[24] *Id.* § 2.3.B, ¶ 7.

[25] *Id.* § 2.4.A.

[26] MGs, *supra* note 2, § 2.2.A, ¶ 4.

[27] *Id.* § 2.4.B, ¶ 4.

[28] United States v. Falstaff Brewing Corp., 410 U.S. 526, 534 (1973).

[29] United States v. Marine Bancorp., Inc., 418 U.S. 602, 625 (1974).

[30] MGs, *supra* note 2, § 2.5.A, concluding paragraphs.

[31] *Id.* § 2.5.C.

[32] *Id.* § 2.5.B.

[33] *Id.* § 2.6, ¶ 1.

[34] *Id.* § 2.6, ¶ 2.

[35] Ford Motor Co. v. United States, 405 U.S. 562 (1972).

[36] MGs, *supra* note 2, § 2.6 n.32.

[37] *Id.* § 3.0, ¶ 1.

[38] United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

[39] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J. dissenting).

[40] *Gen. Dynamics*, 415 U.S. at 508, 510–11. Although the court did not exactly see it this way, the market shares also were faulty in *United States v. U.S. Sugar Corp.*, 73 F.4th 197 (3d Cir. 2023).

[41] Chi. Bridge & Iron Co. NV v. FTC, 534 F.3d 410, 423 (5th Cir. 2008); *see* United States v. Anthem, Inc., 236 F. Supp. 3d 171, 213 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017). ("The standard for the quantum of evidence defendants must produce to shift the burden back is relatively low.").

[42] Plaintiffs' Proposed Conclusions of Law, ¶4, United States v. JetBlue Airways Corp., No. 1:23-cv-10511 (D.Mass. Dec. 13, 2023), ECF # 444.

[43] United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1966).

[44] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957).

[45] Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986) (citation to *Philadelphia National Bank* omitted).

[46] *See* FTC v. Rag-Stiftung, 436 F. Supp. 3d 278, 289 (D.D.C. 2020) (equating the two).

[47] Stanley Works v. FTC, 469 F.2d 498, 505, 508 (2d Cir. 1972).

[48] *Id.* at 505.

[49] United States v. JetBlue Airways Corp., No. 23-10511-WGY, 2024 U.S. Dist. LEXIS 7509, at *109 (D. Mass. Jan. 16, 2024).

[50] *Id.*

[51] United States v. Falstaff Brewing Corp., 410 U.S. 526, 555–56 (1973) (Marshall, J., concurring).